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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

WILLIAM THOMAS HOLDER,

On Habeas Corpus.

F070846

(Super. Ct. Nos. 1464082, 1473929)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez, Louis M. Vasquez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Franson, J. and DeSantos, J.

In 2014, defendant William Thomas Holder appealed, contending his prior prison term enhancement should be stricken because the conviction underlying it has been reduced to a misdemeanor under Proposition 47. We disagreed and affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. As we explain, we deem this appeal a petition for writ of habeas corpus. (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus].)¹ We granted defendant's request to file a second supplemental brief, in which he contends one of his terms must be stayed. We now conclude the prior prison term enhancement must be stricken, a term stayed, and defendant resentenced.

BACKGROUND

On September 3, 2014, in case No. 1464082, defendant pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a)(1);² count 2). He admitted having served seven prior prison terms (§ 667.5, subd. (b)).

The same day, in case No. 1473929, defendant pled no contest to possession of a firearm by a felon (§ 29800, subd. (a)(1); count 1) and possession of ammunition by a prohibited person (§ 30305, subd. (a)(1); count 2). He admitted having served the same seven prior prison terms (§ 667.5, subd. (b)).

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).)

¹ The parties do not object to our deeming the appeal a habeas proceeding.

² All statutory references are to the Penal Code unless otherwise noted.

On December 5, 2014, in case No. 1464082, defendant filed a petition for resentencing pursuant to Proposition 47 (§ 1170.18) on count 1, possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

On December 17, 2014, in case No. 1464082, the trial court granted the Proposition 47 petition for resentencing and reduced count 1, possession of methamphetamine, to a misdemeanor. The court sentenced defendant to eight months on count 2, possession of ammunition. In case No. 1473929, the trial court sentenced defendant to nine years eight months: two years on count 1, eight consecutive months on count 2, plus seven years for the prior prison terms. In the two cases together, defendant's sentence amounted to 10 years four months.

On December 30, 2014, defendant filed a notice of appeal.

On July 10, 2015, the trial court granted another Proposition 47 petition, reducing defendant's 2000 felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in case No. 1004102 to a misdemeanor.³ This 2000 conviction had served as the basis of one of the seven prior prison terms alleged and admitted in the two cases above.

On February 11, 2015, defendant filed a notice of appeal, arguing, among other things, that one of his prior prison term allegations was based on the felony in case No. 1004102 that had been reduced to a misdemeanor.

On June 21, 2016, we affirmed the judgment in *People v. Holder* (June 21, 2016, F070846) [nonpub. opn.].

On September 19, 2018, the Supreme Court transferred the opinion back to this court, and the parties have submitted supplemental briefs.

³ We take judicial notice of the July 10, 2015 minute order. We decline to take judicial notice of the voter information guides submitted by defendant.

DISCUSSION

I. Prior Prison Term Enhancement

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Rivera, supra*, 233 Cal.App.4th. at p. 1091.)

Proposition 47 also created a new resentencing provision, section 1170.18, that provides procedural mechanisms for (1) resentencing of inmates currently serving sentences for Proposition 47-eligible felonies that are now misdemeanors (§ 1170.18, subds. (a), (b)); and (2) designation of Proposition 47-eligible felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See *Buycks, supra*, 5 Cal.5th at pp. 876-877; *Rivera, supra*, 233 Cal.App.4th at p. 1092.) Once a felony is reduced to a misdemeanor under Proposition 47, it “shall be considered a misdemeanor for all purposes” (§ 1170.18, subd. (k).)

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* concluded that “section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b) enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 890.)

Buycks noted, however, that the mechanism for addressing these already imposed but now unsupported enhancements is not specified by Proposition 47: “Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a

conviction to a misdemeanor in a separate judgment” (*Buycks, supra*, 5 Cal.5th at p. 892.) *Buycks* provided two options for dealing with these enhancements.

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a current Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under Proposition 47. If so, the court may not reimpose those enhancements “because at that point [a] reduced conviction ‘shall be considered a misdemeanor for all purposes.’” (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may ... challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment.” (*Buycks, supra*, 5 Cal.5th at pp. 894-895; see *id.* at p. 896.)

Second, *Buycks* explained that even when a defendant petitions only to reduce a Proposition 47-eligible felony conviction underlying an enhancement, courts are authorized to strike those enhancements: “[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, ... Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47].” (*Buycks, supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks, supra*, at p. 895.) “[T]he collateral consequences of Proposition 47’s mandate to have the redesignated offense ‘be considered a misdemeanor for all purposes’ can properly be enforced by means of

petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he ‘misdemeanor for all purposes’ language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors.” (*Ibid.*) Noting that habeas petitions have been used to afford relief where a collateral attack on enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id.* at pp. 895-896.)

In this case, the second option applies because defendant had already been sentenced when the conviction underlying his prison term enhancement was reduced. Thus, the only avenue of relief available to him is a petition for writ of habeas corpus. Rather than require defendant to file a petition for writ of habeas corpus in the sentencing court, we conclude the better course is to deem this appeal to be a habeas corpus proceeding. We will grant relief and strike the enhancement.

II. Section 654

The parties also agree that defendant’s sentence is unauthorized and his consecutive eight-month term for possession of ammunition contained in the firearm (count 2 in case No. 1473929) must be stayed pursuant to section 654. We agree (see *People v. Jones* (2012) 54 Cal.4th 350, 357; *People v. Lopez* (2004) 119 Cal.App.4th 132, 137-139) and will stay the term.

DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. The petition is granted. The prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) based on the 2000 conviction under Health and Safety Code section 11377, subdivision (a) is stricken. The consecutive eight-month term for possession of ammunition (Pen. Code, § 30305, subd. (a)(1); count 2 in case No. 1473929) is stayed. The matter is remanded to the trial

court for resentencing. The court is directed to forward certified copies of the amended abstract of judgment to the appropriate entities.

Defendant's request for judicial notice of the July 10, 2015 minute order is granted. Defendant's request for judicial notice of the voter information guides is denied.